

2013 Magistrate Judges Conference

May 6-8, 2013
Boise, Idaho



Questions to Consider

- Is the Court the ultimate guardian?
- Whose problem is this?
- What is the balance to achieving effective monitoring without overburdening the fiduciary and the estate?

The Systems Necessary to Recognize a Case “At Risk”

- Maximizing the use of technology
- Qualified staff to review reports and accounts
- Use of checklists to monitor cases
- Using all available resources

Decades of Failing Fiduciaries and Reform in Arizona

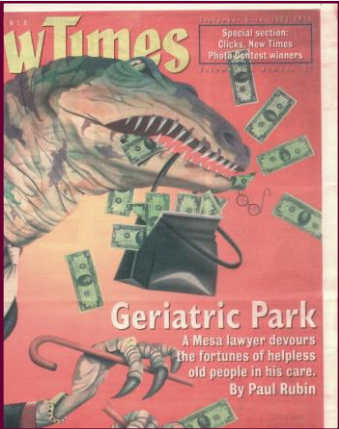
- What can be learned from Arizona’s process and events
 - The horror stories of financial abuse by Arizona fiduciaries
 - The role of the media
 - The reaction of the judiciary
 - Resulting reforms

Articles and Investigations



September 1993

- Weber Mackey
 - Private Fiduciary
- Wayne Legg
 - Attorney



Weber Mackey Case



- 25 Cases, 1.2 million in losses
- Civil Recovery on bonds of at least 80% by the Public Fiduciary
- News Articles revealed weakness in Court monitoring
- Wayne Legg convicted of criminal offense after second trial

Weber Mackey Case (cont.)



- Resulting reform: Legislation in 1994 to register private fiduciaries
- Personal lobby by Probate Judge for new legislation
- Initial draft of regulations exempted Public Fiduciaries
 - No exemption for trust departments
- Problem: No funding for legislation

Michael Daw, Mohave County Public Fiduciary 1996

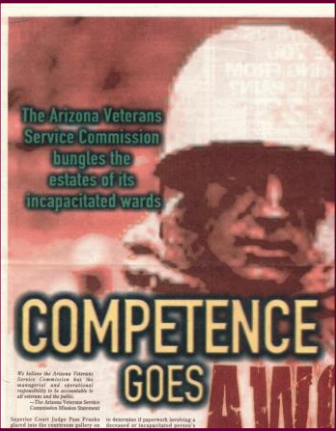
- 20 Cases, approx. 1.2 million in losses
- Recovery out of the Mohave County budget and insurance
- Served 10 year prison sentence
- Result: Concern over how Public Fiduciaries operate

**Robert Farrer,
Attorney 1996**

- Overcharging of fees in about 15 cases
- Made loans to himself from client estates
- Suspended from law practice for 5 years
- This case led to push for funding of legislation by Probate judge
- Public Fiduciary took over cases and recoveries

**Arizona Dept.
of
Veterans
Services**

- 1997- 1998



**Arizona Dept. of
Veterans Services**



- Mismanagement of funds only
- Replacement of unaccounted funds
- Restricted by Court in accepting cases
 - For about 2 years - Public Fiduciaries and Private Fiduciaries received their new cases

**Deborah Merritt, Private Fiduciary
Former Adult Protective Services
Caseworker**

- Outright theft of \$180,000 from three estates
- Civil recovery on bonds - 100%
- No criminal prosecution

**Marilyn Summers, Private Fiduciary
Pima County - 1997**

- \$2 million in about 30 cases
- Some un-bonded losses
- Criminal Conviction


**Private Fiduciary Certification
Program Coordinator Hired
1997 - 1998**

- New regulations include Public Fiduciaries and Trust departments
- All fiduciaries now must be certified
 - Training and Testing



Nancy Elliston

- Past President of AFA
- First Private Fiduciary in Arizona
- Expert witness in Wayne Legg criminal conviction




Nancy Drew

ONCE CONSIDERED A MODEL PRIVATE FIDUCIARY, **NANCY ELLISTON** IS NOW UNDER INVESTIGATION FOR ALLEGEDLY HELPING HERSELF TO **THOUSANDS OF DOLLARS** BELONGING TO **INCAPACITATED PEOPLE**

BY PAUL RUBIN

Nancy Elliston September, 1999



- Discovery of losses in about 15 cases
- Public Fiduciary appointed on civil recoveries
- Criminal referral made
- Everyone betrayed and embarrassed
- Court ignored several warning signs because of her reputation.

New Times Article On Probate Court and Elliston

- Focus of article on Probate Court
- History of late accountings by Elliston
- Was restricted from taking new cases
- No accounting filed, for over 9 years, in one case
- Losses amounted to about \$160,000
 - All recovered through bonds

Rita Reill Corbin
Gila County Public Fiduciary

- 2000 - Fiduciary’s attorney reports to Superior Court funds unaccounted for from client’s estates.
- Auditor General’s Office investigation
 - Thirteen years of no bank reconciliations
- \$1.2 million discovered embezzled from 80 clients
- Fiduciary sentenced to seven years in prison

Frances Goldsmith
Private Fiduciary (3 counties)

- June 2001 - Total assets embezzled over \$1 million plus
 - purchased vehicles for family
 - family vacations, cruises etc.
- Appointments issued without bonds
- Complaint from an heir of an estate brought immediate response by the Court and Law enforcement.

Fiduciary Reforms

- By 2001, went from registration to certification to licensed professional fiduciaries.
- Major changes to statutes and procedures
- Increased regulation of fiduciaries.
- Authority to issue fiduciary arrest warrants.

**The Amazing Case and Story of
Howard Kizer**

**New Probate Rules and
Procedures**

- AZ Supreme Court forms task force in 2008 to standardize probate rules and procedures.
- By January 1, 2009 adopts uniform statewide probate rules, procedures, forms and practice standards.

Marie Long Case

- \$1.3 million estate in 2005.
- Family fighting case
- In less than 4 years, \$892,000 in fees
 - \$183,000 in guardian / conservator fees.
 - \$235,000 in care fees to firm owned by guardian
 - \$474,000 in attorney fees to several lawyers. \$233,000 in fees to one firm.
- All fees approved by Court.
- Because no funds, case referred to Public Fiduciary

Impact Of Marie Long Case

- 47 newspaper articles on Probate Court Fiduciaries and probate attorneys and their practices.
- Although disciplinary complaints filed, no discipline of fiduciaries, attorneys or Probate Commissioner
- Forced the Fiduciary firm (25 employees) out of business because of damaged reputation and high cost of insurance.

**Impact Of Marie Long Case,
(cont.)**

- April 2010, Supreme Court established “Committee on Improving Judicial Oversight and Processing of Probate Matters.”
- Statewide fee guidelines for fiduciary and attorney fees.
- Process to use by courts to review and award fees when disputed

**Impact Of Marie Long Case,
(cont.)**

- More transparency and budgeting of anticipated fees.
- Mandated judicial training statewide for those handling probate cases.
- Final report of Committee (432 pages) issued June 10, 2011.

**15 Red Flags of Fiduciary Abuse,
Exploitation, Neglect and
Misappropriation**

- 🔥 Protected Person has no relatives or active friendships
- 🔥 Large estates
- 🔥 Late or no accountings filed
- 🔥 Multiple ATM transactions

Red Flag (cont.)

- 🔥 Health or personal problems of the fiduciary
- 🔥 Use of several attorneys by the fiduciary
- 🔥 Attorneys representing the fiduciary withdrawing from the fiduciary’s cases

Red Flag (cont.)

- 🔥 Singular control of information by the fiduciary
- 🔥 No automated record keeping by the fiduciary
- 🔥 Financial difficulty of the fiduciary, e.g. (tax liens, judgments, bankruptcy, divorce)

Red Flag (cont.)

- ⚠️ Revocation or failure to renew fiduciary bonds
- ⚠️ Large expenditures in the accounting not appropriate to the client’s setting
- ⚠️ The fiduciary has minimal experience.

Red Flag (cont.)

- ⚠️ Pattern of letters and verbal complaints against the fiduciary
- ⚠️ Lack of oversight on the case by Counsel assigned or Court staff

Other Red Flags ?

Warning signs or red flags from your horror stories.



What can the Court do to Help Prevent Financial Abuse and Control Losses?

- Ensure there is full bonding for all liquid assets and annual income by calendaring a review annually.
- Be proactive. The dishonest fiduciary will recognize it, if you are not.
- Use checklist to monitor risk criteria. See Appendix B.

Proactive Courts

- Are systematic and organized in the monitoring of cases
- Develop a computerized tickler system showing due dates on mandatory reporting requirements on the case
 - guardian reports
 - accountings
 - inventories
 - annual bond reviews

Preventing Financial Abuse and Controlling Losses



- Monitor the caseload through available technology; Seek necessary funding to obtain the technology
- Know your fiduciary and hold them accountable

Fiduciaries Should Be . . .

- Aware of ethics and standards of the fiduciary profession
- Certified as National Certified Guardian by the Center for Guardianship Certification
 - Certification ≠ Qualification



Use of Court Powers

- Investigative Powers
- Audit Powers
- Orders to Show Cause
- Status Hearings
- Use restricted accounts

Reasonableness of Fees

- Scrutinize the fees for reasonableness
- Do not rely on others to object to the fiduciary's fees
- Promote timely review and approval of fees
- Burden on the fiduciary to show reasonableness of fees

**Factors to Determine
Reasonableness of Fees**

- Size of the estate
- The responsibilities involved
- Results achieved
- The knowledge, skill and judgment required by the fiduciary
- Necessity of the services

**Factors to Determine
Reasonableness of Fees**

- The time limits imposed by the circumstances
- The fee customarily charged in the locality for fiduciary services
- See Appendix A for the Third National Guardianship Summit recommendations on fees.

**How Application for Fees Should
Be Presented to the Court**

- Application should include net value of estate
- Detailed statement of services
- Include task performed, date, amount of time, name and position of person performing service
- Results achieved
- Itemization of costs by date, payee, purpose and amount

Utilizing Court Personnel to Monitor Cases

- Court Investigator / Visitor
- Court Appointed Attorney
- Guardian ad Litem
- Volunteers
- Board of Community Guardians

Responding to Failing Fiduciaries

- Be vigorous in the obtaining of information
 - Issue subpoenas or Orders to Show Cause
 - Require status reports when interested parties complain
 - AZ Fiduciary Arrest Warrant

Responding to Failing Fiduciaries



- If the accounting or inventory are in question, require the filing of the original bank statements or other documents

Suspected Theft . . .

- Order an audit
- Determine the number of cases and assets under the fiduciary’s care
- Immediately investigate all of the accounts of the fiduciary
- Refer financial abuse cases to the criminal justice system

Raising the Bar

- Provide the necessary training to fiduciaries and attorneys and guardian
- Require standardization of forms
- Incorporate judicial training throughout the probate court

Final Questions and Comments

- Is the Court the ultimate Guardian?
- Whose problem is this?
- What is the balance to achieving effective monitoring without over-burdening the fiduciary and the estate?
